

considering, or even acknowledging, Comdata's evidence of intent. Pet. App. 20a-21a. The court then observed that "[t]he record is unequivocal on one point: both Flying J and Comdata intended the Trendar License to provide Flying J with data capture and purchase control similar to the 'Comdata model.'" Pet. App. 22a. Because "Comdata's cards were, and are, processed as single transactions," the court said, "[t]he most straightforward interpretation of Article 4.2 . . . is that TCH MasterCard transactions would be processed in the same way." *Id.* Moreover, the court stressed that "Flying J concedes that it did not conceive of the dual-processing model until after the parties entered into the Trendar License," and that the President of TCH "testified that he was not aware of any split transactions over the Trendar System." Pet. App. 26a.

In a brief dissent, Judge McKay observed that he believed the clearly erroneous standard of review required affirmance, but the dissent never addressed the majority's correct determination that the uncontroverted evidence of both parties' contemporaneous specific intent with respect to Article 4.2 precluded the district court's interpretation. Pet. App. 28a-29a.

Although petitioners now assert (Pet. 5) that "the court of appeals refused to consider the purpose of the antitrust laws of promoting competition and consumer welfare," the court did no such thing. Instead, the court correctly concluded that its function was not to disregard the language the parties actually used in the Trendar License and the evidence of the parties' actual specific intent with regard to that language in favor of a nebulous allegedly "pro-competitive" result:

We have no occasion to question the district court's conclusion that Flying J's interpretation of Article 4.2 would better promote the competitive objectives of the antitrust laws. But the issue at this stage is not what would be the most effectual remedy for a proven

antitrust violation; the issue is what the parties *agreed to* in settling the litigation. The parties did not frame their settlement in terms of maximizing competition, but in terms of a specific procedure for processing credit card transactions.

Pet. App. 22a (emphasis added). Based on the record before it, the court of appeals correctly held that the parties did not intend to require split-processing of TCH MasterCard transactions. By relying on the language of the agreement and both parties' specific intent, the court's opinion is fully consistent with both state and federal law, and presents no issue warranting further review.

The careful and thorough opinion also did not depart from established precedent concerning the scope of appellate review. Contrary to petitioners' characterizations that the court weighed competing testimony (Pet. 16-17), the court based its holding on the undisputed evidence offered by both parties, including Flying J's own concessions that it intended to replicate the "Comdata model" (which did not involve split processing for MasterCard transactions), and that it did not even *conceive* of split processing until well after the Trendar License was executed. Pet. App. 26a. The court of appeals applied a well-established standard of review and followed established precedent in applying that standard to the record before it.

Finally, with regard to the district court's adoption of petitioners' 29 pages of advocacy-rich proposed findings, petitioners do not and cannot dispute that the district court's order simply adopted their advocacy. In addressing this feature of the district court's decision, the court of appeals cited and followed this Court's teaching in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). The court noted the difficulties presented by the district court's verbatim adoption, and at the same time made clear that "[t]he district court's adoption of a party's proposed findings does not change the

standard of review....” Pet. App. 11a. Given the court’s unequivocal statement that it was applying the clear error standard and given the court’s unremarkable application of that standard to the record before it, petitioners’ third question presented does not provide any basis for review here.

REASONS FOR DENYING THE PETITION

I. NONE OF THE QUESTIONS PRESENTED IS SUITABLE FOR REVIEW BY THIS COURT

Even apart from the merits, petitioners have not presented any question of the sort that this Court normally reviews. Much less have petitioners presented “compelling reasons” for review, within the meaning of this Court’s Rule 10.

As to the first question presented, petitioners did not raise the issue in the district court or in the court of appeals—either before the panel or in their petition for rehearing. Petitioners neither cited any of the federal cases on which they base the first question in their petition nor did they argue that federal substantive law should provide any interpretive guidance with regard to the Trendar License. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (“Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.”); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

Giving their submissions below the most generous reading, petitioners argued that, when they negotiated the Trendar License, they generally intended to produce a pro-competitive effect. Petitioners never contended, however, that the federal antitrust laws should control or guide the relevant issue of contract interpretation. Instead, both parties briefed and argued the matter entirely as a matter of state contract law. This Court does not sit to resolve disputes regarding the proper interpretation of a contract under state law.

Even if the first question had been properly raised and a federal question properly presented, petitioners' claim of a conflict, either with decisions of this Court or with decisions of other courts of appeals, is illusory. As we explain in greater detail below, all of the federal cases that petitioners now cite are readily distinguishable from the present case and do not turn on legal principles in conflict with those applied by the court of appeals.

Petitioners' second and third questions do not identify any erroneous standard adopted by the court of appeals, and instead complain about the application of a properly articulated rule of law. As Rule 10 explains: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Petitioners identify *Anderson v. Bessemer City*, 470 U.S. 564 (1985), and Rule 52's "clearly erroneous" standard as providing the governing law respecting the scope of review. Pet. 16-19. The court of appeals, however, expressly cited and followed both Rule 52's "clear error" standard and the teachings of this Court in *Anderson*. Pet. App. 11a-12a. At most, therefore, petitioners complain about the court's application of the proper legal standard to the record in this case. That is not normally an appropriate basis for review by this Court. In any event, as we discuss at greater length below, the court of appeals did not misapply the proper legal standards in this case. To the contrary, its careful and thorough opinion is faithful to both the record and the established principles of appellate review.

II. IN ANY EVENT, THE COURT OF APPEALS' DECISION IS CORRECT, AND FURTHER REVIEW IS NOT WARRANTED

A. The Court Of Appeals Properly Construed The Trendar License

The court of appeals' careful opinion followed hornbook contract law in construing the Trendar License. None of the authorities now cited for the first time by petitioners suggests a different conclusion.

First, this case does not concern the interpretation of a consent decree. The contract at issue was a private settlement agreement, not an order of the court. Second, the court of appeals did not "refuse to consider the purpose of the antitrust laws . . .," as petitioners claim. Instead, as previously noted, the court was unwilling to displace the language of the Trendar License and both parties' specific intent concerning that language by turning to an amorphous policy goal of the antitrust laws as a basis for reaching a result at odds with the parties' language and specific intent. In this latter regard, the court of appeals' opinion is fully consistent with both decisions from this Court cited by petitioners, *United States v. Armour & Co.*, 402 U.S. 673 (1971), and *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975).

In *Armour*, this Court rejected the very approach now urged by petitioners, focusing instead on the process of negotiation that leads to the entry of a consent decree and the fact that settling parties waive their rights to present their claims or defenses in litigation in exchange for a *particular and specific compromise*:

Consent decrees are entered into by parties after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the

agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

402 U.S. at 681-82. Based on these observations, the *Armour* Court rejected contentions strikingly similar to those advanced by petitioners here:

For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

Id. at 682.

This Court's subsequent holding in *ITT* neither altered the holding in *Armour* nor supports petitioners' contentions here. In *ITT*, the Court explained that the construction of consent decrees should follow the very hornbook principles of contractual interpretation employed by the court of appeals in this case:

Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated

into the decree. Such reliance does not in any way depart from the "four corners" rule of *Armour*.

420 U.S. at 238 (footnote omitted).

In *ITT*, the question was whether a violation of the prohibition in a consent decree against the defendant's "acquiring" other bakeries was a single violation subject to a one-time fine at the completion of the purchase or a violation that continues from acquisition until divestiture. The record did not include evidence that both parties had assigned the same meaning to the key provision in dispute. Moreover, the consent decree in *ITT* specifically provided that the complaint could be used to construe the terms of the consent decree, and the complaint demonstrated that the term "acquiring" referred to both the purchase and retention of assets. *Id.* at 238-39. Finally, the key term in *ITT* had a specific technical meaning in the antitrust context: in the Clayton Act and antitrust case law, "acquiring" meant both the purchase and retention of assets. *Id.* at 240-43.

Here, the court of appeals painstakingly evaluated the evidence offered by both parties that demonstrated that *neither* party intended the "split transaction" and contractual interpretation urged by petitioners. Pet. App. 20a-28a. Indeed, the court's opinion noted that petitioners never even conceived of what they now claim the contract required until years after they executed the Trendar License. Pet. App. 26a. Thus, the present case is quite unlike *ITT*.

Moreover, petitioners do not suggest that any key term in Article 4.2 of the Trendar License has any meaning specified by the antitrust laws. Instead, they contend that the court of appeals should have subordinated the particular language of the Trendar License and both parties' contemporaneous specific intent concerning that language in favor of petitioners' generalized views concerning the pro-competitive purposes of the antitrust laws. In essence, petitioners suggest

that the court of appeals should have disregarded what the parties actually intended and said in the settlement, and the court instead should have based its decision on a free-floating search for a result that allegedly would be "most competitive." Petitioners' argument is directly contrary to *Armour*, not supported by *ITT*, and would deprive settling litigants of the bargains they negotiate in exchange for relinquishing their claims and defenses in litigation.

Similarly, none of the cases cited by petitioners from the federal courts of appeals conflicts with the decision below. In none of these cases did the court of appeals override the parties' chosen language and the specific intent regarding that language by relying on some notion of the generalized purposes of the substantive law at issue. Moreover, in each of the cases that actually touches on the question, the court either construed a specific term in the consent decree that had a specific meaning in the substantive law or the court used the underlying substantive law merely to confirm that the court's interpretation of the decree did not run afoul of that law. Here, however, petitioners have identified no term in Article 4.2 that has any relevant meaning in the antitrust laws, and even petitioners do not suggest that anything in the court of appeals' opinion runs afoul of the antitrust laws.

For example, *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233 (3d Cir. 2005), concerned the interpretation of a consent decree settling a claim brought pursuant to the Housing Act. *Id.* at 236. Judge Alito noted that "[s]ince a consent decree issued upon the stipulation of the parties has the characteristics of a contract, contract principles govern its construction." *Id.* at 238. After reviewing the decree, the Third Circuit concluded that the decree was unambiguous, and enforced the decree according to its terms. *Id.* at 239.

The Third Circuit went on to note that its interpretation was consistent with the HUD regulations that the consent decree

tracked, and cited *ITT* for the proposition that a court may look to relevant statutes and regulations "to shed light on the terms of a consent decree." *Id.* (emphasis added). However, the court expressly disavowed any intent to make its understanding of the regulations controlling over its interpretation of the consent decree, noting that "the regulations clearly resolve it in the tenants' favor. In this respect, the regulations do not guide our interpretation so much as confirm it." *Id.* at 240. *McDowell* thus is fully consistent with the opinion below.

In *Gilday v. Dubois*, 124 F.3d 277 (1st Cir. 1997), *cert. denied*, 524 U.S. 918 (1998), the First Circuit interpreted the term "specifically permitted" in a consent decree. *Id.* at 285. Although the court stated that it would consider "the basic purposes [the consent decree] was designed to serve," the court resolved the contractual interpretation question, not by looking to the decree's purposes, but primarily through both parties' contemporaneous expressions of intent with regard to the key term. *Id.* at 286-87. In this regard, the court's holding in *Gilday* is actually similar to that of the court below, which also was based on the evidence of record concerning both parties' contemporaneous intent.

In *United States v. Reader's Digest Association, Inc.*, 662 F.2d 955 (3d Cir. 1981), the question concerned whether the term "confusingly" required actual confusion or merely the tendency to confuse. *Id.* at 960. Citing *ITT* and *Armour*, the court stated that although a consent decree "must ordinarily be interpreted by examination of only the 'four corners' of the document, the complaint may be used as an aid in construction when the parties so provide." *Id.* at 961 (internal citations omitted). Unlike the settlement agreement and license in this case, the consent decree in *Reader's Digest* expressly provided that the complaint could be used to construe the terms of the consent decree, and the complaint revealed that

actual confusion was not required. *Id.* *Reader's Digest* is thus not in conflict with the opinion below.

Turner v. Orr, 785 F.2d 1498 (11th Cir. 1986), concerned whether the defendants were responsible for paying costs and attorney's fees only if it was determined that "a violation of the Judgment had occurred," or if defendants had to pay "the expenses reasonably incurred by the Plaintiffs' Monitoring Committee in carrying out its duties under this Judgment." *Id.* at 1501-02. Both phrases were included in the consent decree. *Id.* The court examined documents that were expressly incorporated into the decree, including notices that were sent to class members during the time the parties were finalizing the consent decree and a contemporaneous stipulation indicating that the defendants understood they would pay "the expenses reasonably incurred" pursuant to the consent decree. *Id.* at 1503. The court in no way resorted to the general purposes of the underlying federal substantive law to undermine the particular language or the parties' contemporaneous specific intent.

Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981), also fails to support petitioners' claim of a circuit conflict. *Brown* concerned the interpretation of a consent decree settling discrimination claims in the Toledo fire department. The consent decree expressly stated that the city of Toledo wished to "erase any vestiges of past employment discrimination." *Id.* at 557. The decree also included a stated goal to have "the ratio of minority employment within the fire division reasonably reflect the ratio of each minority group's total population of the city of Toledo." *Id.* at 558. The court merely held that it should construe the decree consistently with the purposes explicitly set forth in the decree itself. There is no inconsistency between *Brown* and the opinion below.

In *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998), the D.C. Circuit construed an "anti-tying" provision in an antitrust settlement. In an approach that is fully

consistent with the approach taken here by the court of appeals, the court explained:

As *Armour* makes clear, however, an antitrust consent decree cannot be read as though its animating spirit were solely the antitrust laws. "[T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve."

The court's task, then, is to discern the bargain that the parties struck; this is the sense behind the proposition that consent decrees are to be interpreted as contracts. To find the meaning of an ambiguous provision we look for the intent of the parties, just as we would with a contract. See *Western Elec. Co.*, 12 F.3d at 231-32 (reading ambiguous provision of consent decree "in light of the parties' jointly intended purpose" (internal quotation omitted)); *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 681-82 (D.C. Cir. 1985) (contract interpretation). In that quest we may rely on the same aids to construction as we would when interpreting an ambiguous contract, including "the circumstances surrounding the formation of the consent order."

147 F.3d at 946 (certain citations omitted).

Having articulated these general principles, the D.C. Circuit construed the consent decree in a manner that gave effect to the parties' joint intent. 147 F.3d at 948. It further stated that its interpretation was *consistent with* the antitrust laws. *Id.* Contrary to petitioners' suggestion, the court did not construe the agreement according to the "purposes" of the antitrust laws, but instead looked for an interpretation that was both in accordance with the parties' mutual intent and that did not run afoul of the antitrust laws. Petitioners, of course, have not contended that the opinion below is contrary to the antitrust laws, and, unlike *Microsoft*, they have not

identified any term in the Trendar License that has any particularized meaning under the antitrust laws.

In *United States v. Western Electric Co.*, 894 F.2d 1387 (D.C. Cir. 1990), the court considered whether the term "manufacture" included merely fabrication or also design and development. *Id.* at 1388-89. The court rejected an approach to construction based on one party's purposes or the goals of the federal legislation upon which the underlying litigation was based, opting instead to base its opinion on both parties' contemporaneous expressions of intent. The court explained:

The District Court's interpretation of the Decree is not designed to implement the purpose of only one party, *see Armour*, 402 U.S. at 682, 91 S. Ct. at 1757, or to implement the purpose of the Sherman Act independently of the parties' intentions, *see ITT Continental Baking Co.*, 420 U.S. at 236-37, 95 S. Ct. at 934-35. As the contemporaneous statements of both parties make clear, the terms on which AT & T and the United States settled the AT & T litigation were intended to eliminate "the potential for monopoly abuse in the future" by "remov[ing], clearly and efficiently, the structural problems that have given rise to the controversies between the United States and AT & T over the last three decades."

Id. at 1392 (emphasis deleted). Thus, *Western Electric* also does not conflict with the opinion below.

Finally, in a last-ditch effort to manufacture a conflict, petitioners point to alleged "internal inconsistencies" in the Second and Seventh Circuits. Such intra-circuit inconsistencies, even if they existed, would not provide any basis for review here; they are appropriately addressed by the relevant court of appeals. In any event, however, none of the cases cited by petitioners reveals any actual internal conflict in either the Second or Seventh Circuits, and none of the cases supports petitioners' contention that a court should subvert

the language of the agreement or the contemporaneous specific intent of both parties by reference to the general purposes of a federal statutory scheme.

B. The Court Of Appeals Adhered To Controlling Principles Of Appellate Review

Petitioners erroneously claim (Pet. 16) that the "Tenth Circuit reversed the district court's findings based on its own perception of the credibility of the parties' key witnesses—Messrs. Adams and Sheridan" In fact, the court of appeals engaged in no such weighing of credibility.

With respect to Mr. Sheridan's testimony, the district court adopted proposed findings written by petitioners that erroneously stated that "Comdata did not present evidence at the hearing indicating that the parties did not intend to accomplish this result [*i.e.*, the split processing] through the Trendar License. Mr. Sheridan participated in the negotiation of the Trendar License but did not offer testimony specifically contradicting that explanation of the parties' intent." Pet. App. 20a. The court of appeals correctly observed that this statement was clear error:

Comdata's chief counsel, Michael Sheridan, testified that Comdata intended to replicate its own processing model for Flying J. . . . He specifically disavowed any intention to authorize split transactions. . . .

Id. (quotations from Mr. Sheridan omitted). Consistent with settled principles of appellate review, the court of appeals held that given the adopted finding of "no evidence," the district court's "failure to consider [Mr. Sheridan's testimony] was a legal error." *Id.* at 834-35, App. 20a-21a.

Nor did the court of appeals weigh the testimony or make credibility determinations. Instead, the court repeatedly observed that Mr. Adams' and petitioners' intent concerning the provision at issue was fully consistent with that of Mr.

Sheridan: both parties intended that any processing of TCH MasterCards would either be directly through TCH pursuant to the Comdata model or through the MasterCard network; neither intended that Trendar would be required to split a transaction. Pet. App. 20a-28a. Indeed, petitioners' own evidence revealed that they did not even conceive of split processing until well after the Trendar License was executed. Pet. App. 26a.

C. The Court Of Appeals Correctly Applied This Court's *Anderson* Opinion

In *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985), this Court repeated its history of criticizing district courts "for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615 n.13 (1974)).

Petitioners do not dispute that the district court adopted verbatim their 29 pages of advocacy-filled proposed findings of fact and conclusions of law. Instead, plaintiffs suggest that this Court should alter its view of the propriety of such verbatim adoptions and actually *encourage* district judges to follow the flawed approach taken by the district court in this case.

This Court has never suggested that a district court cannot use findings proposed by the parties to fashion its own findings or that a district court cannot incorporate portions of proposed findings. Here, however, the district court adopted verbatim 29 full pages of findings proposed by petitioners, with only the most modest of cosmetic changes such as modifying "I find" to "the court finds." Pet. App. 11a n.2. Such verbatim wholesale adoption of a party's lengthy findings suggests a lack of detached and independent analysis

by the district court, and this Court's previous criticism of such an approach is fully justified.

Petitioners' contentions to the contrary are without merit. As this Court has observed, blanket adoption of a party's proposed findings is undesirable, in part because of the "potential for overreaching and exaggeration on the part of attorneys preparing findings of fact" *Anderson*, 470 U.S. at 572. Here, consistent with *Anderson*, although the court of appeals criticized the district court's adoption of petitioners' findings, it nevertheless held that "[t]he district court's adoption of a party's proposed findings does not change the standard of review" Pet. App. 11a. Because the court of appeals properly identified and applied the controlling standard of review, the court's criticism of the procedure followed by the district court both followed established precedent and did not affect the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

FLYING J INC., TCH LLC, CFJ PROPERTIES,
TON SERVICES, INC., AND TFJ,

Petitioners,

v.

COMDATA NETWORK, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

**REPLY BRIEF FOR PETITIONERS IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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**REPLY BRIEF FOR PETITIONERS IN
SUPPORT OF PETITION FOR A WRIT OF
CERTIORARI**

Petitioners Flying J Inc., TCH LLC, CFJ Properties, TON Services, Inc., and TFJ (collectively, "Flying J") respectfully submit this Reply Brief in support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Comdata contends this case does not present a question of federal law. Yet Comdata ignores that: a) the district court sought to interpret the disputed settlement agreement and license in a manner that would promote competition and consumer welfare; and b) the court of appeals majority opinion refused, over the dissent's objection, to consider the goals of the antitrust laws when the majority imposed its own interpretation of these agreements. Thus, Comdata misconstrues the rulings below to defend the court of appeals' ruling, which protects Comdata from competition in the concentrated markets where it holds a dominant market share.

This case presents a rare and important opportunity for this Court to confirm and clarify that federal courts should interpret antitrust settlement agreements in a manner consistent with the goals of the federal antitrust laws. This case also presents an extreme example of a court of appeals failing to respect trial court fact findings and offering unwarranted criticism of the efficient practice of requesting both parties to submit proposed findings of fact and conclusions of law in a complex case. Therefore, the Court should grant the petition.

I. Comdata's Response Avoids The Key Issue Presented Of Whether Federal Courts Can And Should Consider The Procompetitive Goals Of The Antitrust Laws When Enforcing Antitrust Settlement Agreements.

Comdata seeks to avoid the key issue presented with various arguments casting the underlying settlement agreement as just a contract to be interpreted under state law. Yet Comdata's arguments cannot obscure what both lower courts acknowledged: that this settlement compromised antitrust claims that sought to restore competition to markets that Petitioners contended Comdata has monopolized. The district court considered it significant that the settlement involved a compromise of such antitrust claims, and the Tenth Circuit majority opinion held, despite the dissenting judge's contrary view, that it is improper to consider that context. Litigants need this Court's guidance on that issue.

A. Both The District Court And The Tenth Circuit Addressed The Issue That Comdata Contends Was Not Preserved, Of Whether The Parties' Settlement Should Be Construed In Light Of The Goals Of The Antitrust Laws.

Comdata cannot change the fact that both the district court and Tenth Circuit addressed the point that Comdata contends was not preserved, of whether courts should consider the goals of the federal antitrust laws when interpreting an antitrust settlement agreement like the one at issue here. See Petition at 4-5 (quoting from lower courts' decisions). Comdata is mistaken in suggesting, Opp. Br. at 2, 10, that Petitioners cannot ask this Court to review the Tenth Circuit's holding that "it is not our task to determine what would best remedy the underlying antitrust violation," 405 F.3d at 825; Pet. App. 3a, or the dissent's disagreement with that holding, 405 F.3d at 839, Pet. App. 28a-29a.

Comdata seeks to justify its continued exclusion of the TCH fuel card from meaningful access to the Trendar device needed to process trucker fuel card transactions with data capture and purchase control functionality. *See* Opp. Br. at 2-10. Yet Comdata never addresses the evidence the Tenth Circuit noted about "the underlying antitrust violation," 405 F.3d at 825, 827; Pet. App. 3a & 6a, and Comdata cannot deny the context in which the parties settled the underlying antitrust claims.

B. Comdata's Summary Of Lower Court Cases Applying This Court's Precedents In *ITT* and *Armour* Merely Demonstrates That The Lower Courts Do Need Guidance On The Important Issue Presented Here.

Comdata's response presents an extended summary of minutiae about the lower court decisions identified in the Petition that construe *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975) and *United States v. Armour & Co.*, 402 U.S. 673 (1971). Opp. Br. at 15-19. Yet that summary cannot obscure the conclusion that the lower courts have applied *ITT* and *Armour* inconsistently as explained at pp. 10-15 of the Petition.

Comdata's pronouncement that none of these lower court decisions conflicts with the Tenth Circuit decision challenged here depends on its characterization of that decision. According to Comdata, the Tenth Circuit chose not to "override the parties' chosen language and the specific intent regarding that language by relying on some notion of the generalized purposes of the substantive law at issue." Opp. Br. at 15.

In fact, however, the Tenth Circuit reversed the district court in part because that court *did* consider the context in which the parties entered into their settlement. *See* Pet. at 5; *see also* Pet. at 6 (quoting Judge McKay's dissent: "What

we do know is that the overall purpose of the license was to open access to the market. . . . The district court's selection of the interpretation that favors optimal opening of the competitive market seems to me to be eminently reasonable and supported by the record. Resolving any doubt in favor of the purpose of the antitrust statutes strengthens this conclusion." 405 F.3d at 839; Pet. App. 29a).

Comdata's rhetoric about alleged "specific intent" cannot change the principle this Court recognized in *ITT*, and the D.C. Circuit recognized in the *Microsoft* and *Western Electric* cases, that evidence surrounding an agreement's negotiation and tending to explain ambiguous terms should be admissible. See Pet. at 9, 12; *ITT*, 420 U.S. at 238 & n.11 (proper to consider circumstances surrounding formation of consent order); *Microsoft Corp.*, 147 F.3d at 946 ("the consent decree emerged from antitrust claims"); *Western Electric Co.*, 894 F.2d at 1392 (proper to consider context of consent decree). As explained in the Petition, the lower courts have not consistently handled the information about the context of an antitrust settlement and the Tenth Circuit's challenged decision below rejected the relevance of that antitrust context. Pet. at 10-15.

II. Comdata's Response Minimizes The Tenth Circuit's Failure To Respect The District Court's Fact-Finding Role.

Comdata attempts to minimize the Tenth Circuit's misapplication of principles governing "clearly erroneous" review of fact findings. Opp. Br. 20-21. Yet no amount of rationalizing can change that the Tenth Circuit reversed the district court's fact findings because it found the testimony of Comdata's witness (Mr. Sheridan) more persuasive than Flying J's witness (Mr. Adams).

The Tenth Circuit should not have subverted the rule this Court established in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). The Tenth Circuit's ruling represents an extreme departure from this Court's guidance in *Anderson*. The Court should grant the Petition to demonstrate to courts of appeals that they cannot overturn a district court's fact findings simply because they disagree with the district court's decision to credit the testimony of one witness over another.

III. Comdata's Response Also Minimizes The Harm From The Tenth Circuit's Unwarranted Criticism Of The Efficient Procedure Of A District Court Requesting And Relying On Proposed Findings From Each Side In A Complex Case.

Finally, Comdata cannot reasonably justify the Tenth Circuit's unwarranted criticism of the district court's procedure of requesting and relying on proposed findings of fact and conclusions of law from both sides in this complex case. Opp. Br. at 21-22. The fact that the district court did not find Comdata's proposed findings persuasive did not make this procedure inappropriate or unfair.

The Tenth Circuit's criticism of this procedure sends entirely the wrong message and will chill the use of an appropriate and efficient procedure by trial judges involved in technically complex cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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